

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs July 31, 2015

EVA L. HINES v. TERENCE J. HINES

**Appeal from the Circuit Court for Rutherford County
No. 67470 Royce Taylor, Judge**

No. M2014-01836-COA-R3-CV – Filed November 20, 2015

This is a divorce case. Eva L. Hines (Wife) filed a complaint for divorce from Terence J. Hines (Husband) while he was incarcerated in Arkansas. Husband was released from prison several days before the scheduled date of trial. Before and after his release, Husband asked that the case be continued so he could secure an attorney. On the original trial date, the court granted Husband's request and continued the case for two weeks. On the morning of the rescheduled trial date, Husband called and advised the court that he would be late; in response, he was told that trial would begin as scheduled. Husband did not appear at the courthouse in time for the trial. The trial proceeded in his absence, and the court entered a final divorce decree. Husband filed a Tenn. R. Civ. P. 60.02 motion requesting that the court set aside the final decree, which he says substantively amounts to a default judgment. He seeks a new trial. The court denied his motion. Husband appeals. We affirm the trial court's judgment denying his Rule 60 motion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded**

CHARLES D. SUSANO, JR., C.J., delivered the opinion of the court, in which D. MICHAEL SWINEY, and JOHN W. MCCLARTY, JJ., joined.

Dana C. McLendon III, Franklin, Tennessee, for the appellant, Terence J. Hines.

Sandra L. M. Smith, Murfreesboro, Tennessee, for the appellee, Eva L. Hines.

OPINION

I.

The parties married in February 2012 and separated in August 2013. Wife filed for divorce on December 23, 2013, alleging three “grounds,” *i.e.*, irreconcilable differences, Husband’s inappropriate marital conduct, and his felony conviction and subsequent incarceration, which, according to Wife, was due, in part, to the revocation of his parole following a domestic assault upon her. Their union did not produce children.

Acting on his own, Husband filed a motion on March 4, 2014, for “enlargement of time,” in which he requested 180 days to find an attorney and conduct a factual investigation following his release from prison in Arkansas. In his motion, Husband asserted that he disagreed with the facts in Wife’s complaint; he said he wanted to resume marriage counseling with Wife.

On March 11, 2014, Wife filed a motion for a default judgment, alleging that Husband failed to file a responsive pleading within thirty days of service of process. The court heard Wife’s motion on March 28, 2014. Wife was present at that hearing, but Husband was not. Wife asserts that Husband’s motion was then “perceive[d]” as a “responsive pleading,” which prompted her to file a motion to set for mediation and trial. The court granted Wife’s latter motion and entered an order on April 9 setting the case for trial on May 7, 2014. In correspondence sent via facsimile on April 11, 2014, Wife’s counsel notified Husband and the deputy warden secretary at the Arkansas Department of Correction that she was sending a completed inmate access to telephones form to allow Husband to participate by phone in the May 7 hearing. Along with it, Wife’s counsel attached a copy of the trial court’s order setting the hearing. In the order, were instructions as to how Husband was to call in to participate in the proceedings.

Husband was released from prison on May 1, 2014. The following day, Wife moved for an *ex parte* temporary restraining order. The court granted the order the same day “based upon [Wife’s] sworn Motion . . . that [she] will suffer immediate and irreparable harm, injury, loss or damage” before the court could hold a hearing on the matter. The order prohibited and restrained Husband from “coming about” Wife or “removing any items of personal property from the marital home, pending further orders of [the] Court.”

In a letter Husband drafted just before his release from prison, which was filed with the court on May 5, 2014, Husband, still acting *pro se*, asked the court about the status of his March 4 motion. Additionally, he stated he had contacted two Tennessee attorneys about his case, but was still awaiting a response. He added that if he did not hear from them soon “then [he] will have to ask for a [continuance] on this case” so that he could acquire representation. On May 5, 2014, Husband drafted a motion for

continuance,¹ in which he noted that he had spoken with an attorney. Husband noted that he, being Husband, had a conflict – a mandatory intake meeting with his parole officer – the afternoon of the trial date. The court heard Husband’s arguments requesting additional time on May 7 and granted a continuance until May 21, 2014. Husband, Wife, and Wife’s counsel were present at the May 7 hearing.

Husband filed a motion for temporary court orders, in which he sought the right to collect certain personal belongings from the marital home. The court heard the motion on May 16, 2014, with Husband, Wife, and Wife’s counsel present. The court granted Husband’s motion the same day, permitting him – in the presence of a law enforcement officer – to collect personal items from the marital home at a designated time. Specifically, Husband was permitted to take title and possession of his motorcycle.

Husband failed to appear for the trial on May 21, 2014. In the final decree of divorce, the trial court stated that

[p]resent before the Court were [Wife], her witnesses and counsel. Not present was [Husband], who contacted the Court and reported he would be late, but was advised that the case was set to go forward at 9:00 a.m. Further, the Court takes note that Defendant was present in Court on May 7, 2014 when the date of May 21, 2014 was set for the trial of this matter, and had notice of the date and time of trial. Having called the case on the second docket call, Plaintiff moved to go forward.

Ultimately, the trial court granted wife a divorce on the grounds of domestic violence and abuse under Tenn. Code Ann. § 36-4-101(11) (2014).² The court entered its order “[h]aving heard testimony of the Plaintiff and witnesses, having reviewed the evidence presented, and having heard arguments of counsel and considering the record as a whole.”

¹ Based upon the record, it is unclear whether the motion was filed with the court prior to the May 7 hearing. Husband notes in his brief that

[t]he [May 5] motion is not stamped ‘FILED’ by the court clerk. It is unclear why that is the case. The motion bears a facsimile tag of May 5, 2014 at 2:57 p.m. The certificate of service Mr. Hines signed indicates that he served it on May 5, 2014 by facsimile.

² “The husband or wife is guilty of such cruel and inhuman treatment or conduct towards the spouse as renders cohabitation unsafe and improper, which may also be referred to in the pleadings as inappropriate marital conduct.” Tenn. Code Ann. § 36-4-101(11).

In an affidavit filed July 3, 2014, Husband explains his absence from the trial as follows:

In part because of the allegations my wife made, my probation officer did not allow me to travel to Murfreesboro until the day of the final hearing. I was forced to rely upon public transportation to get to the courthouse. I was not able to get to the courthouse for the final hearing until 10:15 the morning of the final hearing.³ By that time, it appears the final hearing had begun and ended.

(Footnote added.)

The trial court ordered Husband to pay Wife's attorney's fees and court costs. It made permanent Wife's restraining order against Husband. Husband disputes the court's final decree. He states that he does "not believe the final decree in this case represents a fair and equitable division of the marital estate. . . . [W]ife was awarded substantially more assets than I believe to be fair, and our debt was not allocated fairly."

On July 3, 2014, Husband, through counsel, filed a motion under Tenn. R. Civ. P. 60.02 to set aside the final decree of divorce and to hold a new hearing on the merits. He argues that "the substantive result" of the court's final divorce decree amounts to a "default judgment" against him. In an affidavit filed in support of his Rule 60.02 motion, Husband says that he now has a lawyer and "believe[s] it would be fair to set aside the final decree of divorce and allow me to participate in a new final hearing, with my lawyer."

On August 15, 2014, the court heard oral argument on Husband's most recent motion.⁴ The court declined to grant it, finding instead that

[Husband] was before the Court on May 7th and May 16th, *pro se*. On both dates he was informed of the scheduled trial date, May 21. On May 16th, the court heard testimony from [Husband], on his Motion, regarding property he desired out of the marriage. Upon agreement of the [Wife], [Husband] took possession of a motorcycle and was awarded the

³ In Wife's brief on appeal, she agrees that Husband arrived at the courthouse after the conclusion of the trial, but disputes the time of Husband's arrival. She states the trial ended at approximately 11:00 or 11:30 a.m.

⁴ This appeal is before us on the technical record only.

property he requested. [Husband] had notice and opportunity to be heard both prior to and on the Trial date and failed to appear.

Upon hearing, it was determined that the motorcycle was the only property owned by the parties with equity value. While the award of property may have been inequitable, the equity favored [Husband] over [Wife], as no property taken by her held value that was unencumbered by loan.

Husband now appeals the trial court's denial of his Rule 60.02 motion and requests a new trial on the merits.

II.

On appeal, Husband raises the issues of whether the trial court erred first by failing to rule on his request for an "enlargement of time" and then by conducting the trial in his absence.

III.

The decision of whether to continue a case is within the sound discretion of the trial court. *Sanjines v. Ortwein & Assoc.*, 984 S.W.2d 907, 909 (Tenn. 1998); *Bell v. Todd*, 206 S.W.3d 86, 93 (Tenn. Ct. App. 2005). "An appellate court cannot interfere with the trial court's decision unless such decision constitutes an abuse of discretion and causes prejudice to the party seeking the stay or continuance." *Sanjines*, 984 S.W.2d at 909. "A trial court abuses its discretion only when it 'applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

Husband argues that the final divorce decree was, in effect, a default judgment. He is wrong. The trial court chose to proceed with the trial as scheduled, not because of Husband's failure to timely respond to the complaint, but rather because Husband failed to appear at trial despite having personal knowledge of the trial date. While it is true that Husband never filed a responsive pleading⁵ and this failure *could have* been the basis for a default judgment, the fact of the matter is that the trial court was prepared to hold a hearing even in the absence of a responsive pleading. The failure of Husband to attend the trial was the basis for the court to proceed to trial in the Husband's absence. The trial court did not abuse its discretion in proceeding to trial in this case. "If a discretionary

⁵ A motion for continuance is not a response to the allegations of a complaint.

decision is within a range of acceptable alternatives, we will not substitute our judgment for that of the trial court . . .” *Riad v. Erie Ins. Exch.*, 436 S.W.3d 256, 266 (Tenn. Ct. App. 2013), *appeal denied* (Mar. 4, 2014).

IV.

A.

Husband’s counsel argues that “the record contains no express ruling by the trial court upon Husband’s pretrial motion whereby he requested that this matter be held in abeyance for 180 days.” Citing *Knight v. Knight*, 11 S.W.3d 898, 906 (Tenn. Ct. App. 1999), his counsel avers that “[t]his by itself requires that the final decree be vacated and the matter remanded, with instructions to proceed on the merits.” In support, Husband relies, in part, on the *Bell* case, in which we stated that

reviewing courts have consistently held that trial courts err when they proceed to adjudicate the merits of the claim without first addressing the prisoner’s pending motion or motions. These oversights have generally been found to be prejudicial rather than harmless because the failure to address pending motions “give[s] the impression that a litigant is being ignored.” *Logan v. Winstead*, 23 S.W.3d 297, 302 (Tenn. 2000) . . . Accordingly, when a trial court has failed to rule on an incarcerated litigant’s pending motions, reviewing courts have consistently vacated the judgment and remanded the case to the trial court with directions to consider and act on the pending motions.

206 S.W.3d at 91 (footnotes omitted).

Bell involved a wrongful death action brought by the victim’s family against Roger Todd, the man criminally charged with the victim’s murder. *Id.* at 89-90. Representing himself, Todd was present for the civil hearings involved in the case, but failed to file an answer or written response to the family’s complaint. *Id.* at 90. Eventually, the family moved for a default judgment, and the court granted it. *Id.* Weeks before the trial on damages was to occur, Todd filed four pleadings with the trial court. *Id.* Without considering his motions, the trial court proceeded with the damages portion of the trial and went on to award the victim’s family compensatory and punitive damages. *Id.* at 92. On review, this court held that the trial court’s decision

was plain error, notwithstanding the fact that Mr. Todd had not requested a hearing on any of these motions. Accordingly, we vacate the judgment awarding compensatory

and punitive damages against Mr. Todd and remand the case to the trial court with directions to consider and dispose of each of Mr. Todd's motions using the legal standards applicable to each of these motions and to enter an order specifying its reasons for either granting or denying each motion.

Id. (citations omitted).

Distinct from *Bell*, the trial court in the present case *did* rule on Husband's request for enlargement of time before proceeding with a trial on the merits. On May 7, 2014, the court granted additional time, pushing back the trial date two weeks. Further, the court entered an order on May 16, 2014, specifying its reasons for granting Husband's request to reset the trial. Coincidentally, that order gave the same reasons for granting the continuance that Husband had listed in his earlier pleadings – to allow Husband time to find counsel and because he had a mandatory meeting with his parole officer on the scheduled day of trial. While the court did not give Husband the amount of additional time he requested, it still heard argument on the motion, and, based on the parties' arguments, granted Husband a continuance. As *Bell* noted,

[t]rial courts have broad power to control their dockets and the proceedings in their courts. The exercise of this authority requires an exercise of judgment and the careful weighing of the competing interests. Accordingly, the decision whether to continue a case is a discretionary one.

Id. at 93 (internal citations omitted). Neither Husband's circumstances, nor his justifications for requesting additional time limited the trial court's discretion. In his original motion for an enlargement of time, Husband requested 180 days to allow him to find an attorney after his release from prison. The court was not obligated to grant Husband a 180-day continuance. The trial court did not abuse its discretion by declining to grant Husband the full amount of time he requested in his motions.

For the above reasons, we find that the trial court ruled on Husband's motions for continuance and enlargement of time prior to the trial and acted within its discretion by choosing to continue the trial to May 21, 2014.

B.

The opportunity to be heard is a fundamental requirement of due process. *Brown v. Brown*, No. 01-A-01-9510-CV-00480, 1996 WL 563877, at *2 (Tenn. Ct. App. M.S., filed Oct. 4, 1996) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950)). “[W]e generally recognize that the party litigant is entitled to be present in all

stages of the actual trial of the case.” *In re Valle*, 31 S.W.3d 566, 573 (Tenn. Ct. App. 2000) (citing *Warren v. Warren*, 731 S.W.2d 908, 909 (Tenn. Ct. App. 1985)). Due process considerations are “somewhat diminished” for prisoners, where “incarceration necessarily limits a prisoner’s right to be heard by personal appearance.” *Brown*, 1996 WL 563877, at *2.

Here, the court took steps to ensure Husband could participate in the final hearing, affording him an opportunity to be heard. When Husband was incarcerated, arrangements were made with the Arkansas Department of Correction to allow Husband to participate in the final hearing via telephone. When Husband was out of prison and requested additional time, the court granted it, though, as discussed above, Husband was given less time than he requested. Prior to the final hearing, the court entered the May 16 order allowing Husband to collect certain personal property from the marital home, including his motorcycle – presumably providing him with a means of transportation. Still, Husband failed to appear for trial, not because of his incarceration or lack of notice, but because he arrived late to the courthouse.

In this case, Husband notified the court on the morning of the trial (1) that he would be late in arriving at the courthouse and (2) that he did not have counsel there to represent him in his absence. Husband gave two reasons for his lateness – his reliance on public transportation and his inability to travel to Murfreesboro until the day of the trial, which he says is because of allegations Wife made to his probation officer. Husband gives no additional explanation or verification of these claims. Husband failed to establish that the trial court abused its discretion by conducting the trial in his absence after he failed to appear. As a result, it was within the acceptable alternatives for the court, in its discretion, to deny Husband’s Rule 60.02 motion for a new trial and uphold the final divorce decree. We affirm the trial court’s decision.

V.

The judgment of the trial court is affirmed. The case is remanded, pursuant to applicable law, to the trial court for enforcement of the judgment and collection of costs assessed below. Costs on appeal are assessed to the appellant, Terence J. Hines.

CHARLES D. SUSANO, JR., CHIEF JUDGE